Sabah Development Bank Bhd v TYL Land & Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-743–04 OF 2022
VAZEER ALAM, MARIANA YAHYA AND WONG KIAN KHEONG JJCA
15 AUGUST 2024

Companies and Corporations — Winding up — Proof of debt — Secured creditors — Whether secured creditors could revalue security and withdraw proof of debt after proof of debt accepted by liquidator — Whether secured creditors could revalue security and withdraw proof of debt after voting on debt at a creditors' meeting — Doctrine of equitable estoppel — Whether barred secured creditors from revaluing security and withdrawing proof of debt

The appellant bank ('bank') had several credit facilities to the respondent company ('respondent'). The repayment of the credit facilities by the respondent was secured by four debentures and a charge over a piece of land located in Semenyih ('the said land'). The abandonment of the project lead to the respondent defaulting its loan and eventually leading to the respondent being wound up. The official receiver ('OR') was appointed as a liquidator in the respondent. However, the bank appointed a receiver and manager ('R&M') over the respondent company. Although the property valuer valued the said land at RM13m, the R&M received a proposal from Tristar Union Sdn Bhd to acquire the project and the land for RM24.2m. The R&M rejected the proposal but failed to inform the bank about the said rejection. The appellant bank's solicitors then proceeded to file four proof of debt ('four PODs') with the OR. The bank's four PODs did not demarcate which part of the respondent's debt was secured and which portion thereof was unsecured. The appellant bank then applied to the winding up court to replace the OR with its proposed liquidator. Vide a letter by the OR, the bank was notified that it was required to surrender its security if it intended to proceed with the four PODs. In reply, the bank responded that it did not intend to surrender its security and demarcated the secured and unsecured portion of the bank's debt. Subsequently, the OR accepted the bank's four POD. The value of the bank's security was accepted at RM13m and the bank was ranked as an unsecured creditor of the respondent for a sum of RM22,600,758.57. In a creditors' meeting held by the OR, the bank voted as an unsecured creditor of the respondent for a sum of RM23,600,758.57. Fajarbaru Builder Sdn Bhd ('Fajarbaru') was then appointed by the respondent company to continue construction works on the land. Fajarbaru filed a same application ie to replace the OR as the respondent's liquidator, to which the bank opposed. Fajarbaru

was successful in its application, and its proposed liquidators wrote to the bank to demand to remove the R&M, on the basis that the bank had surrendered its security as it had fully participated in the creditors' meeting 'based on the whole debt'. Around April 2021, the bank was informed by the R&M that the latter had received a proposal from Kara Power Engineering Sdn Bhd ('Kara') to acquire the project and the land at a price of RM44,823,072.44. Kara's proposal, if accepted by the R&M, would exceed the respondent's debt and the bank would not need to participate in the respondent's liquidation as an unsecured creditor. The R&M and the bank's solicitors replied to the new liquidators, stating that the bank had never intended to surrender its security and given the new realisable value of the land, the bank intended to expunge its four PODs and relied exclusively on its security for the repayment of the respondent's loan. The new liquidators rejected the bank's request. The bank subsequently filed an application in the winding up court to expunge the PODs. The judicial commissioner ('JC') dismissed the bank's expungement application on the grounds. Hence the present appeal. The issues that arose for determination were: (a) whether the bank as a secured creditor could revalue their security and withdraw their proof of debt after their proof of debt having been accepted by the liquidator; (b) whether the bank could revalue their security and withdraw their proof of debt after having voted on their debt at a creditors' meeting; and (c) whether the doctrine of equitable estoppel barred secured creditors from revaluing their security and withdrawing their proof of debt.

Held, dismissing the appeal:

(1) It was implied that in s 524(2) of the Companies Act 2016 ('the CA'), for the purpose of an effective exercise of the secured creditor's power to realise security, the secured creditor: (a) may revalue the security subsequent to the secured creditor's valuation and the secured creditor; and (b) may withdraw or amend the secured creditor's claim for its unsecured debt portion. Further, according to para 13 of Schedule C to the Insolvency Act 1967 ('the IA'), secured creditors could amend the valuation of the security if: (i) the previous valuation was made bona fide on a mistaken estimate; or (ii) the security had increased in value since its previous valuation. Paragraph 15 of Schedule C to the IA on the other hand, provided that if a secured creditor had previously valued the security and subsequently realised it, the 'net amount realised shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor'. Therefore, as a secured creditor, the bank was entitled to revalue the land and withdraw its four PODS (see paras 32 & 35).

(2) Rule 126 of the of the Companies (Winding-Up) Rules 1972 ('the CWUR') did not bar a secured creditor from amending its valuation of

its security or withdrawing or amending its claim for its unsecured debt. A company's secured creditor shall only be deemed to have surrendered the security if the secured creditor votes in the company's liquidation with regard to the secured creditor's 'whole debt' (which included both the secured and unsecured portions of the debt). In this case, the bank did not vote at the creditors' meeting with regard to the entire respondent's debt. Consequently, there could not be any room for the invocation of r 126 of the CWUR in the present case (see paras 36 & 43).

(3) The JC committed an error of law in deciding that the bank was estopped from denying the contents of the four PODs. The equitable estoppel doctrine was invoked to achieve justice. If the doctrine of equitable estoppel was applied in this case, namely, to bar the bank from revaluing the land and to withdraw the four PODs, there would be an injustice to the bank because the extent of the bank's interest as the respondent's secured creditor would be unjustly reduced. Furthermore, the court's expungement of the four PODs did not cause any injustice to the unsecured creditors (see para 46).

[Bahasa Malaysia summary

Perayu bank ('bank') mempunyai beberapa kemudahan kredit kepada syarikat responden ('responden'). Pembayaran balik kemudahan kredit oleh responden telah dicagar dengan empat debentur dan gadaian ke atas sekeping tanah yang terletak di Semenyih ('tanah tersebut'). Pengabaian projek menyebabkan responden gagal membayar pinjamannya dan akhirnya menyebabkan responden digulung. Pegawai Penerima ('PP') telah dilantik sebagai pelikuidasi dalam responden. Bagaimanapun, bank melantik penerima dan pengurus ('P&P') ke atas syarikat responden. Walaupun penilai hartanah menilai tanah tersebut pada RM13 juta, P&P menerima cadangan daripada Tristar Union Sdn Bhd untuk memperoleh projek dan tanah tersebut pada harga RM24.2 juta. P&P menolak cadangan itu tetapi gagal memaklumkan bank mengenai penolakan tersebut. Peguamcara perayu bank kemudiannya meneruskan untuk memfailkan empat bukti hutang ('empat BH') dengan PP. Empat BH bank tidak menyatakan bahagian mana daripada hutang responden yang bercagar dan bahagian mana daripadanya tidak bercagar. Perayu bank kemudian memohon kepada mahkamah penggulungan untuk menggantikan PP dengan pelikuidasi yang dicadangkannya. Melalui surat oleh PP, bank telah dimaklumkan bahawa ia dikehendaki melepaskan cagarannya jika ia berhasrat untuk meneruskan dengan empat BH. Sebagai jawapan, bank membalas bahawa ia tidak bercadang untuk melepaskan cagarannya dan membahagikan bahagian hutang bank secara dengan cagaran dan tidak bercagar. Selepas itu, PP menerima empat BH bank. Nilai cagaran bank itu diterima pada RM13 juta dan bank itu disenaraikan sebagai pemiutang tidak bercagar responden dengan jumlah RM22,600,758.57. Dalam mesyuarat pemiutang yang

diadakan oleh PP, bank dipilih sebagai pemiutang tidak bercagar responden untuk jumlah RM23,600,758.57. Fajarbaru Builder Sdn Bhd ('Fajarbaru') kemudiannya dilantik oleh syarikat responden untuk meneruskan kerja-kerja pembinaan tanah tersebut. Fajarbaru memfailkan permohonan yang sama iaitu untuk menggantikan PP sebagai pelikuidasi responden, yang mana ditentang oleh bank. Fajarbaru berjaya dalam permohonannya, dan pelikuidasi yang dicadangkan menulis kepada bank untuk menuntut agar P&P dipecat, atas dasar bank telah melepaskan cagarannya kerana ia telah mengambil bahagian sepenuhnya dalam mesyuarat pemiutang 'berdasarkan hutang keseluruhan'. Sekitar April 2021, bank dimaklumkan oleh P&P bahawa pihaknya telah menerima cadangan daripada Kara Power Engineering Sdn Bhd ('Kara') untuk memperoleh projek dan tanah itu pada harga RM44,823,072.44. Cadangan Kara, jika diterima oleh P&P, akan melebihi hutang responden dan bank tidak perlu mengambil bahagian dalam likuidasi responden sebagai pemiutang tidak bercagar. P&P dan peguamcara bank membalas kepada pelikuidasi baharu, menyatakan bahawa bank tidak pernah berhasrat untuk melepaskan cagarannya dan memandangkan nilai baharu tanah yang boleh direalisasikan, bank itu berhasrat untuk menghapuskan empat BHnya dan bergantung sepenuhnya pada cagarannya untuk pembayaran balik pinjaman responden. Pelikuidasi baru menolak permintaan bank. Bank itu kemudiannya memfailkan permohonan di mahkamah penggulungan untuk menghapuskan BH. Pesuruhjaya kehakiman ('PK') menolak permohonan penghapusan bank atas alasan. Oleh itu rayuan semasa. Isu-isu yang timbul untuk penentuan adalah: (a) sama ada bank sebagai pemiutang bercagar boleh menilai semula sekuriti mereka dan menarik balik bukti hutang mereka selepas bukti hutang mereka diterima oleh pelikuidasi; (b) sama ada bank boleh menilai semula cagaran mereka dan menarik balik bukti hutang mereka selepas memilih hutang mereka pada mesyuarat pemiutang; dan (c) sama ada doktrin estoppel menghalang pemiutang bercagar daripada menilai semula cagaran mereka dan menarik balik bukti hutang mereka.

Diputuskan, menolak rayuan:

(1) Ia adalah dinyatakan secara tersirat bahawa dalam s 524(2) Akta Syarikat 2016 ('AS'), bagi tujuan melaksanakan kuasa pemiutang bercagar secara berkesan untuk merealisasikan cagaran, pemiutang bercagar: (a) boleh menilai semula cagaran itu selepas penilaian pemiutang bercagar dan pemiutang bercagar; dan (b) boleh menarik balik atau meminda tuntutan pemiutang bercagar untuk bahagian hutang tidak bercagarnya. Selanjutnya, menurut perenggan 13 Jadual C Akta Insolvensi 1967 ('AI'), pemiutang bercagar boleh meminda penilaian sekuriti jika: (i) penilaian sebelumnya dibuat secara bona fide atas anggaran yang tersilap; atau (ii) sekuriti itu telah meningkat nilainya sejak penilaian sebelumnya. Perenggan 15 Jadual C kepada AI

sebaliknya, dengan syarat bahawa jika pemiutang terjamin sebelum ini menilai sekuriti dan kemudiannya merealisasikannya, 'amaun bersih yang direalisasikan hendaklah digantikan dengan amaun apa-apa penilaian yang dibuat sebelum ini oleh pemiutang dan hendaklah dianggap dalam semua aspek sebagai penilaian pindaan yang dibuat oleh pemiutang'. Oleh itu, sebagai pemiutang bercagar, bank berhak menilai semula tanah dan mengeluarkan empat BHnya (lihat perenggan 32 & 35).

(2) Kaedah 126 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('KKPS') tidak menghalang pemiutang bercagar daripada meminda penilaiannya terhadap sekuritinya atau menarik balik atau meminda tuntutannya untuk hutang tidak bercagarnya. Pemiutang bercagar syarikat hanya akan dianggap telah menyerahkan sekuriti jika pemiutang bercagar memilih dalam likuidasi syarikat berkenaan dengan 'seluruh hutang' pemiutang bercagar (yang termasuk kedua-dua bahagian hutang bercagar dan tidak bercagar). Dalam kes ini, bank tidak mengundi pada mesyuarat pemiutang berkenaan dengan keseluruhan hutang responden. Akibatnya, tidak ada ruang untuk memakai kaedah 126 KKPS dalam kes ini (lihat perenggan 36 & 43).

(3) JC melakukan kekhilafan undang-undang dalam memutuskan bahawa bank itu dihalang daripada menafikan kandungan empat BH. Doktrin estoppel digunakan untuk mencapai keadilan. Sekiranya doktrin estoppel digunakan dalam kes ini, iaitu, menghalang bank daripada menilai semula tanah dan menarik balik empat BH, akan berlaku ketidakadilan kepada bank kerana sejauh mana kepentingan bank sebagai pemiutang bercagar responden akan dikurangkan secara tidak adil. Tambahan pula, penghapusan mahkamah terhadap empat BH tidak menyebabkan sebarang ketidakadilan kepada pemiutang tidak bercagar (lihat perenggan 46).]

Cases referred to

BSC Elevators Sdn Bhd v Sineo Enterprise Sdn Bhd & Anor [2016] MLJU 1147, HC (refd)

Champtaloup v Thomas [1976] 2 NSWLR 264, CA (refd)

Jambatan Merah Sdn Bhd v Public Bank Berhad [2015] MLJU 1208; [2016] 1 CLJ 811, HC (refd)

K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor [2005] 2 MLJ 201, FC (refd)

Madsen-Ries v Greenhill [2017] NZCCLR 6, HC (refd)

Malayan Banking Bhd v Chip Lam Seng Enterprise Bhd [2015] 5 CLJ 260, HC (refd)

Malgran Resources Sdn Bhd (in liquidation) (receiver appointed), Re [2021] MLJU 2679, HC (refd)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi

bin Mukhtar [2020] 1 MLJ 141; [2020] 1 CLJ 1, FC (refd)
Pilecon Realty Sdn Bhd v Public Bank & Ors and another appeal [2013] 3 MLJ 1, FC (refd)
Sunrise Megaway Sdn Bhd (in liquidation) v Kathryn Ma Wai Fong [2021] 3 MLJ 602, CA (refd)
Surfers Paradise Investments Pty Ltd (in liquidation) v Davoren Nominees Pty Ltd [2003] QCA 458, CA (refd)
Weatherburn v Bradley BC8100255, FC (refd)

Legislation referred to

Civil Law Act 1956 s 4(1)
Companies (Winding-Up) Rules 1972 rr 35(2), 94, 95, 126
Companies Act 1965 (repealed by Companies Act 2016) ss 231, 372
Companies Act 2016 ss 2(1), 524, 524(1)(a), (1)(b), (1)(c), (2), (8), (8)(b), (9), (10)
Courts of Judicature Act 1964 s 16
Insolvency Act 1967 s 42, Schedule C, paras 13, 15
Interpretation Acts 1948 and 1967 ss 2(1)(b), (1)(e), 15, 23(1), Part I
National Land Code
Revision of Laws Act 1968

Appeal from: Post Winding-Up No BA-28PW-255–09 of 2021 and Companies (Winding-Up) No BA-28NCC-966–10 of 2018 (High Court, Kuala Lumpur)

Eng Tiong Mei & Lee Xiao Yao (Jal & Lim) counsel for appellant.
Ganesan Karuppannan, Subashini Ramakrishnan & Luqman bin Zainal Fikri (Ganesan & Irmohizam) counsel for respondent's liquidators.

Wong Kian Kheong JCA (delivering judgment of the court):

A. INTRODUCTION

[1] This judgment discusses the following three novel questions:

(1) where:

(a) a secured creditor of a company had filed proofs of debts ('PODs') in the company's liquidation ('liquidation') and the PODs had stated:

(i) the secured creditor's valuation ('secured creditor's valuation (security)') of the security which is an asset of the company charged in favour of the secured creditor ('security'); and

(ii) the secured creditor's claim in the liquidation of a certain sum as an unsecured debt due from the company to the secured creditor

('secured creditor's claimed sum (unsecured debt portion)');

(b) the company's liquidator had accepted the PODs;

(c) the secured creditor had applied to the winding up court to replace the company's liquidator;

(d) the secured creditor had voted in a creditors' meeting regarding the replacement of the company's liquidator; and

(e) the secured creditor had opposed an application by a company's unsecured creditor to replace the company's liquidator

— whether the secured creditor can amend the secured creditor's valuation ('security'), withdraw or amend the secured creditor's claimed sum (unsecured debt portion) pursuant to:

(aa) s 524(1)(a) , (b) and (2) of the Companies Act 2016 ('the CA'); and

(bb) paras 13 and 15 of Schedule C ('Paragraph 13' and 'Paragraph 15') to the Insolvency Act 1967 ('the IA') read with s 4(1) of the Civil Law Act 1956 ('the CLA') and s 42 of the IA;

(2) does r 126 of the Companies (Winding-Up) Rules 1972 ('the CWUR') bar the secured creditor from:

(a) amending the secured creditor's valuation (security); and

(b) withdrawing or amending the secured creditor's claimed sum (unsecured debt portion)?

Regarding the above issue, if r 126 of the CWUR is inconsistent with s 524(1)(a), (b) and (2) of the CA read with paras 13 and 15, whether by virtue of s 23(1) of the Interpretation Acts 1948 and 1967 ('Interpretation Acts'), r 126 CWUR is void to the extent of the inconsistency; and

(3) due to the facts stated in the above sub-paras (1)(a) to (e), does the equitable estoppel doctrine bar the secured creditor from amending the secured creditor's valuation (security), withdrawing or amending the secured creditor's claimed sum (unsecured debt portion)? In this regard, can a case law doctrine of equitable estoppel override s 524(1)(a) and (2) of the CA read with paras 13 and 15?

B. BACKGROUND

[2] The appellant bank ('bank') had granted term loans, bridging loans and credit facilities ('credit facilities') to the respondent company ('respondent').

[3] The repayment of the credit facilities by the respondent was secured as follows: A

(1) the respondent had executed four debentures in favour of the bank ('debentures'); and

(2) a charge under the National Land Code ('the NLC') over a piece of land held by the respondent under Geran 328165, Lot 43929, Mukim of Semenyih, Ulu Langat District, Selangor ('land') had been registered by the respondent in favour of the bank ('NLC charge'). B

[4] The respondent was constructing a development project on the land ('project') before the project was abandoned by the respondent. C

[5] On 3 January 2019:

(1) the High Court ('Winding Up Court') ordered the winding up of the respondent; and D

(2) the official receiver ('OR') was appointed by the Winding Up Court as a liquidator of the respondent.

[6] As a holder of the debentures, the bank appointed Mr Lim Keng Peo from Deloitte Corporate Solutions Sdn Bhd as a receiver and manager ('R&M') of the respondent. E

[7] A property valuer, CH Williams Talhar & Wong Sdn Bhd ('CHWTW'), had valued the land on 24 April 2019 as follows: F

(1) the 'as is basis' value of the land was RM2m; and

(2) based on certain assumptions, the land was valued at RM13m ('CHWTW's valuation (24 April 2019)'). G

[8] The R&M received a proposal dated 28 June 2019 from Tristar Union Sdn Bhd to acquire the project and the land at a price of RM24.2m ('Tristar's proposal (RM24.2m)'). Tristar's proposal (RM24.2m) was not accepted by the R&M. H

[9] The R&M did not inform the bank regarding Tristar's proposal (RM24.2m). Nor was the bank aware of Tristar's proposal (RM24.2m).

[10] Without knowledge of Tristar's proposal (RM24.2m), on 17 December 2019, the bank's then solicitors, Messrs Wilson Lim ('bank's former solicitors') filed four PODs with the OR in respect of the liquidation of the respondent. According to the four PODs filed by the bank's former solicitors, among others: I

[11]

POD	Type of facility granted to respondent	Amount of debt claimed by bank as at 3 January 2019 (RM)
1	Term loans and bridging loan granted on or about 27 June 2014 totalling RM28m	12,104,421.80
2	Bridging loan granted on or about 28 December 2016 totalling RM9m	9,078,150.56
3	Additional bridging loan granted on or about 4 September 2018 totalling RM10m	13,466,409.28
	Total amount	35,600,758.57

[12] This judgment shall refer to the sum of RM35,600,758.57 as the 'respondent's debt (3 January 2019)'.

[13] The bank's four PODs did not demarcate which part of the respondent's debt (3 January 2019) was secured and which portion thereof was unsecured.

[14] On 9 January 2020, the bank applied to the Winding Up Court to replace the OR as the respondent's liquidator with Datuk Mohd Afrizan bin Dato' Husain ('bank's application (replacement of respondent's liquidator)').

[15] With regard to the bank's four PODs, the OR sent an email dated 17 January 2020 to the bank's former solicitors ('OR's email (17 January 2020)') which stated as follows, among others (in our National language):

> 2. Dimaklumkan, semakan kami mendapati bahawa bukti hutang yang difailkan merupakan tuntutan terhadap hutang bercagar.
>
> 3. Merujuk kepada peruntukkan [sic] di dalam Akta Syarikat, anak guaman [sic] tuan boleh melupuskan terus cagaran yang dipegang tanpa memfailkan bukti hutang kepada Jabatan ini. Oleh itu, kami akan menolak bukti hutang yang telah difailkan.
>
> 4. Walau bagaimanapun, sekiranya anak guaman [sic] tuan ingin meneruskan niat untuk memfailkan bukti hutang yang telah difailkan, cagaran yang dipegang hendaklah dilepaskan, supaya kami dapat mengambil tindakan selanjutnya.
>
> 5. Sehubungan itu, mohon pendirian anak guaman [sic] tuan dalam perkara ini dan jawapan hendaklah diberi dalam tempoh empat belas (14) hari. Sekiranya kami tidak mendapat apa-apa maklum balas selepas daripada tempoh yang diberikan,

bukti hutang yang difailkan akan ditolak.

[16] The bank's former solicitors replied to the OR's email (17 January 2020) in an email and letter, both dated 29 January 2020 ('bank's email/letter (29 January 2020)'). According to the bank's email/letter (29 January 2020), among others (in our National language):

> 2. Untuk makluman [OR], [Bank] akan mengekalkan Bukti-bukti Hutang bertarikh 16.12.2019 (difailkan pada 17.12.2019) ('BBH tersebut'). Dalam hal ini —
>
> (a) hutang [respondent] kepada [Bank] pada tarikh penggulungan adalah sekitar RM35,600,758.57;
>
> (b) *[Bank] merupakan pemiutang debentur dan bercagar. Cagaran tersebut tidak akan dilepaskan pada masa kini dan pelepasan hanya boleh dibuat apabila aset-aset bercagar tersebut dilupuskan pada masa hadapan. Dalam pada itu, [Bank] akan memaklumkan kepada [OR] akan pelupusan tersebut dan mengemaskinikan Bukti Hutang dengan [OR] pada masa kelak;*
>
> (c) anggaran nilai (value) aset yang bercagar dinilai secara anggaran oleh pihak ketiga ... setakat pada 21.8.2019 hanya —
>
> (i) RM2,000,000 jika diambil dari kiraan 'as is basis'; atau
>
> (ii) pada takat maksimum, jika diambil dari kiraan 'assumption basis', hanya RM13,000,000.00;
>
> *Sesalinan [CHWTW's Valuation] ... dilampirkan di sini untuk perhatian [OR]; dan*
>
> (d) *hak [Bank] berhubung BBH tersebut masih berkuatkuasa dan sah berdasarkan* s 524(b) Akta Syarikat 2016 *berhubung jumlah yang berkurangan (takat minima) sebanyak RM23,600,758.57 (RM35,600,758.57 – RM13,000,000) dan tidak terjumlah kepada pelepasan hak [Bank] ke atas aset bercagar.*
>
> 3. Andai kata [OR] mempunyai apa-apa pertanyaan, sila hubungi pihak kami pada bila-bila masa. *Kami juga berterima kasih atas notis [OR] bertarikh 23.1.2020 yang memaklumkan mesyuarat pemiutang pada 12.2.2020 yang mana [Bank] akan menghantar proxinya [sic] untuk hadir*. (Emphasis added.)

A copy of CHWTW's Valuation (24 April 2019) was forwarded to the OR by way of the bank's email/letter (29 January 2020).

[17] The OR accepted the bank's four PODs as follows:

(1) the value of the bank's security was accepted at RM13m; and

(2) the bank was ranked as an unsecured creditor of the respondent for a sum of RM22,600,758.57.

[18] On 12 February 2020, the OR held a creditors' meeting ('creditors' meeting (12 February 2020)'). At the creditors' meeting (12 February 2020):

(1) the bank's former solicitors attended as proxies for the bank; and

(2) in support of the bank's application (replacement of respondent's liquidator), the bank voted as an unsecured creditor of the respondent for a sum of RM23,600,758.57 (presumably based on the contents of the bank's email/letter (29 January 2020)) ('bank's vote as respondent's unsecured creditor (creditors' meeting)').

[19] Fajarbaru Builder Sdn Bhd ('FBSB') had been appointed by the respondent to do construction works ('works'). FBSB had carried out some of the works and as at 3 January 2019, the respondent owed a sum of RM37,943,246.21 to FBSB for the works.

[20] On 9 March 2020, FBSB filed an application in the Winding Up Court for Datuk Ooi Woon Chee and Mr Tam Kok Meng to replace the OR as the respondent's liquidator ('FBSB's application (replacement of respondent's liquidator)').

[21] The bank opposed FBSB's application (replacement of respondent's liquidator) ('bank's opposition (FBSB's application)') while FBSB resisted the bank's application (replacement of respondent's liquidator).

[22] On 4 September 2020, the Winding Up Court:

(1) dismissed the bank's application (replacement of respondent's liquidator); and

(2) allowed FBSB's application (replacement of respondent's liquidator). Henceforth, the liquidators of the respondent are Datuk Ooi Woon Chee and Mr Tam Kok Meng ('liquidators').

[23] The solicitors for the liquidators, Messrs Ganesan & Irmohizam, sent a letter dated 14 April 2021 to the bank ('liquidators' letter (14 April 2021)'). The liquidators' letter (14 April 2021) stated as follows, among others:

(1) the bank had 'fully participated and voted' in the creditors' meeting (12 February 2020) 'based on the whole amount' in the four PODs. Hence, pursuant to r 126 of the CWUR, the bank had 'clearly given up its security' and would prove the 'whole debt' in liquidation;

(2) the bank was put on notice that the R&M appointed by the bank 'no longer enjoy the rights, power and protection of the Debentures' and the bank should 'immediately remove' R&M and surrender all securities and assets to the liquidators, failing which, the bank 'shall be held liable for all

losses' suffered by the respondent in liquidation; and

(3) the liquidators demanded for the bank to remove R&M within 14 days from the liquidators' letter (14 April 2021) and upon the bank's failure to do so, the liquidators 'will be compelled to commence legal action seeking appropriate order and costs' against the bank without any further reference to the bank.

The liquidators' letter (14 April 2021) was copied to the R&M.

[24] In or around April 2021, the bank was informed by the R&M that the latter had received a proposal from Kara Power Engineering Sdn Bhd ('Kara') to acquire the project and the land at a price of RM44,823,072.44 ('Kara's proposal (RM44,823,072.44)'). Kara's proposal (RM44,823,072.44), if accepted by the R&M, would exceed the respondent's debt (3 January 2019) and the bank would not need to participate in the respondent's liquidation as an unsecured creditor.

[25] The R&M replied to the liquidators' letter (14 April 2021) in a letter dated 19 April 2021 ('R&M's letter (19 April 2021)'). According to the R&M's letter (19 April 2021), among others:

(1) the R&M had sought the bank's view on the contents of the liquidators' letter (14 April 2021);

(2) the bank 'never' had the intention to surrender its security. In fact, when the bank filed the four PODs with the OR, the bank had already enforced the debentures by appointing the R&M over the respondent's charged assets;

(3) it was expressly stated in the four PODs that the bank was a secured creditor of the respondent;

(4) the bank's email/letter (29 January 2020) had replied to the OR's email (17 January 2020) by asserting the bank was the respondent's secured creditor and would not surrender its security until the charged assets were realised;

(5) the bank's vote as respondent's unsecured creditor (creditors' meeting) was not based on the entire respondent's debt (3 January 2019) as alleged in the liquidators' letter (14 April 2021). The bank's vote as respondent's unsecured creditor (creditors' meeting) was premised on the unsecured portion of the respondent's debt (3 January 2019) in a sum of RM22,600,758.57;

(6) the bank had now ascertained that the 'current realizable value' of its security had exceeded RM13m. Hence, the bank would apply to the liquidators to withdraw its four PODs; and

(7) the bank would continue to enforce and realise its security.

[26] There was no reply by the liquidators' solicitors to the R&M's letter (19 April 2021). Contrary to the demand in the liquidators' letter (14 April 2021), the liquidators did not file any suit against the bank and R&M for:

(1) a declaration that the bank had surrendered its security and consequently:

(a) the debentures could not be enforced by the bank against the liquidators; and

(b) the NLC charge was unenforceable against the liquidators; and

(2) the R&M should be removed.

[27] In response to the liquidators' letter (14 April 2021), the bank's present solicitors, Messrs Jal & Lim, sent a letter dated 20 April 2021 ('bank's letter (20 April 2021)'). The bank's letter (20 April 2021) stated as follows, among others:

(1) the bank 'never had the intention of surrendering its security' to the liquidators; and

(2) as the bank had ascertained that the current realizable value of its security had exceeded RM13m:

(a) as a secured creditor of the respondent, the bank would rely exclusively on its security for the repayment of the respondent's debt (3 January 2019); and

(b) the bank applied to the liquidators to expunge its four PODs under r 94 of the CWUR ('bank's expungement application (20 April 2021)').

[28] In a letter dated 7 May 2021 to the bank's solicitors, the liquidators' solicitors rejected the bank's expungement application (20 April 2021) ('liquidators' dismissal (bank's expungement application)').

C. PROCEEDINGS IN WINDING UP COURT

[29] In view of the liquidators' dismissal (bank's expungement application), on 7 September 2021, the bank filed an application in the Winding Up Court to expunge its four PODs ('bank's expungement application (Winding Up Court)').

[30] The learned judicial commissioner (as he then was) ('JC') dismissed the bank's expungement application (Winding Up Court) with costs of

RM12,000 ('Winding Up Court's decision'). Hence, this appeal to the Court of Appeal by the bank against the Winding Up Court's decision ('this appeal'). A

[31] According to the 'Grounds of Judgment' ('GOJ') of the Winding Up Court's decision, among others: B

(1) based on an objective evaluation of all the evidence, the learned JC decided that the bank had elected under s 524(1)(b) of the CA to participate in the respondent's liquidation as its unsecured creditor for a sum of RM22,600,758.57 ('alleged bank's election (participation in respondent's liquidation)') — please refer to paras 34 and 44 GOJ. Reliance was placed by the Winding Up Court on the following two judgments: C

   (a) the decision of Khadijah Idris JC (as she then was) in the High Court case of *BSC Elevators Sdn Bhd v Sineo Enterprise Sdn Bhd & Anor* [2016] MLJU 1147; and D

   (b) the judgment of the Court of Appeal of New South Wales in *Champtaloup v Thomas* [1976] 2 NSWLR 264.

(2) the following evidence supported the alleged bank's election (participation in respondent's liquidation): E

   (a) CHWTW's valuation (24 April 2019) and the bank's email (29 January 2020) — para 34 GOJ;

   (b) the bank's vote as respondent's unsecured creditor (creditors' meeting) which was made 'in accordance' with r 126 CWUR — para 37 GOJ; and F

   (c) the bank's opposition (FBSB's application) and the bank's application (replacement of respondent's liquidator) — para 38 GOJ. G

(3) the bank did not make any mistake in the filing of its four PODs — para 43 GOJ;

(4) the bank's expungement application (Winding Up Court) was an afterthought because the bank's expungement application (Winding Up Court) was filed on 7 September 2021: H

   (a) about 20 months after the filing of the bank's four PODs on 17 December 2019; and

   (b) approximately 19 months after the bank's vote as respondent's unsecured creditor (creditors' meeting) on 12 February 2020 I

   — para 38 GOJ;

(5) the bank was estopped from denying the contents of its four PODs because at all material times, the bank had the benefit of legal advice — para 40 GOJ;

(6) premised on the Court of Appeal's judgment delivered by Kamaludin Md Said JCA in *Sunrise Megaway Sdn Bhd (in liquidation) v Kathryn Ma Wai Fong* [2021] 3 MLJ 602, the Winding Up Court 'should not usurp the functions of the liquidator or interfere with the conduct or decision of the liquidator in discharging his role and function in company liquidation' — para 42 GOJ; and

(7) in view of the above reasons, the bank could not rely on r 95 of the CWUR and/or the inherent jurisdiction of the Winding Up Court — para 45 GOJ.

D. SUBMISSION BY PARTIES

[32] In support of this appeal, the bank's learned counsel had contended as follows, among others:

(1) the bank had never intended to surrender the land as security for the credit facilities;

(2) the four PODs were filed based on a mistake regarding the value of the land;

(3) the Winding Up Court did not give effect to s 524(2) of the CA and its own judgment in *Re Malgran Resources Sdn Bhd (in liquidation) (receiver appointed)* [2021] MLJU 2679;

(4) in view of an increase in the value of the land, the learned JC should have allowed the bank's expungement application (Winding Up Court) pursuant to r 95 of the CWUR; and

(5) the Winding Up Court's decision had greatly prejudiced the bank.

[33] The liquidators' learned counsel had advanced, among others, the following submission to resist this appeal:

(1) the bank had expressly elected under s 524(1)(b) of the CA to surrender the land as security due to the bank's 'vigorous participation' in the respondent's liquidation as follows:

(a) the bank had filed the four PODs with the benefit of legal advice. In fact, the four PODs were filed by the bank's former solicitors;

(b) the bank's application (replacement of respondent's liquidator) had been made;

(c) upon query by way of the OR's email (17 January 2020), the bank's

email/letter (29 January 2020) had clearly stated that the bank would claim a sum of RM23,600,758.57 as an unsecured debt in the respondent's liquidation;

(d) the OR as the respondent's then liquidator had accepted the four PODs as follows:

(i) the value of the bank's security was accepted at RM13m; and

(ii) the bank was ranked as an unsecured creditor of the respondent for an amount of RM22,600,758.57.

(e) the bank's vote as respondent's unsecured creditor (creditors' meeting); and

(f) the bank's opposition (FBSB's application).

(2) in addition to the cases cited in the Winding Up Court's decision, reliance was placed on the following cases:

(a) the judgment of Queensland's Court of Appeal in *Surfers Paradise Investments Pty Ltd (in liquidation) v Davoren Nominees Pty Ltd* [2003] QCA 458;

(b) the Federal Court's decision in *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201; and

(c) the judgment of Downs J in the New Zealand High Court case of *Madsen-Ries v Greenhill* [2017] NZCCLR 6; and

(3) there was no mistake by the bank with regard to the filing of the four PODs. Furthermore, the bank did not adduce any affidavit from its officer regarding any mistake in the four PODs.

OUR DECISION

E. RELEVANT STATUTORY PROVISIONS

[34] We reproduce below s 524(1), (2), (8) to (10) of the CA, rr 95, 126 of the CWUR, s 4(1) CLA, s 42 IA, paras 13 and 15:

s 524 CA *Rights and duties of secured creditors*

(1) *A secured creditor may —*

(a) *realise a property subject to a charge, if entitled to do so*;

(b) *value the property subject to the charge and claim in the winding up as an unsecured creditor for the balance due, if any; or*

(c) *surrender the charge to the liquidator for the general benefit of creditors and claim in the winding up as an unsecured creditor for the whole debt.*

(2) *A secured creditor may exercise the power referred to in paragraph (1)(a) whether or not the secured creditor has exercised the power referred to in paragraph (1)(b).*

...

(8) *The liquidator may at any time, by notice in writing, require a secured creditor, within twenty-one days from the receipt of the notice, to —*

(a) *elect which of the powers referred to in subsection (1) the creditor wishes to exercise; and*

(b) *if the creditor elects to exercise the power referred to in paragraph (1)(b) or (c), exercise the power within that period.*

(9) *A secured creditor on whom notice has been served under subsection (8) who fails to comply with the notice is to be taken as having surrendered the charge to the liquidator under paragraph (1)(c) for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for the whole debt.*

(10) *A secured creditor who has surrendered a charge under paragraph (1)(c) or who is taken as having surrendered a charge under subsection (9) may, with the leave of the Court or the liquidator and subject to such terms and conditions as the Court or the liquidator thinks fit, at any time before the liquidator has realised the property charged —*

(a) *withdraw the surrender and rely on the charge*; or

(b) *submit a new claim under this section.*

CWUR

r 95 *Expunging at instance of creditor.*

The Court may also expunge or reduce *a proof upon the application of a creditor* or contributory *if the liquidator declines to interfere in the matter.*

r 126 Votes of secured creditors.

For the purposes of voting a secured creditor shall unless he surrenders his security, state in his proof or in a voluntary liquidation in such statement as is hereinafter mentioned the particulars of his security, the date when it was given, and the value at which the assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

s 4 CLA Administration of insolvent estates, and winding up of companies.

(1) In the administration by any Court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and *in the winding up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt.*

s 42 IA Rules as to proof of debts.

The rules in Schedule C shall be observed with respect to the mode of proving debts, *the right of proof by secured* and other *creditors, the admission and rejection of proofs* and other matters.

Paragraph 13

Where a creditor has so valued his security he may at any time amend the valuation and proof on showing to the satisfaction of the Director General of Insolvency or the court that the valuation and proof were made bona fide on a mistaken estimate, or that the security has diminished *or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor and upon such terms as the court orders, unless the Director General of Insolvency allows the amendment without application to the court.*

Paragraph 15

If a creditor, after having valued his security, subsequently realizes it, or if it is realized under rule 12, *the net amount realized shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor*. (Emphasis added.)

F. INTERPRETATION OF S 524(1), (2), (8) TO (10) OF THE CA READ WITH S 4(1) OF THE CLA, S 42 OF THE IA, PARAS 13 AND 15

[35] Firstly, s 524 of the CA is a new provision which is not provided in the previous Companies Act 1965 ('the CA (1965)'). Consequently, cases decided pursuant to the CA (1965) regarding the rights, powers and duties of a company's secured creditors in the company's winding up ('previous cases') have to be read with caution. Needless to say, if the previous cases are inconsistent with s 524 of the CA, the previous cases are overruled by Parliament by way of s 524 of the CA to the extent of such an inconsistency.

[36] We are of the considered view regarding the effect of s 524(1), (2), (8) to (10) of the CA read with s 4(1) of the CLA, s 42 of the IA, paras 13 and 15 as follows:

(1) s 524(1) of the CA confers the following four powers on a company's secured creditor ('secured creditor's four powers'):

   (a) the company's secured creditor has a power under s 524(1)(a) of the CA to 'realise a property subject to a charge, if entitled to do so' ('secured creditor's power to sell security (para (a))'). Section 2(1) of the CA has defined a 'charge' to include 'a mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise';

   (b) by virtue of s 524(1)(b) of the CA, the company's secured creditor has the following two powers to:

(i) value the security ('secured creditor's power to value security (para (b))'); and claim in the winding up as an unsecured creditor for the balance due from the company to the secured creditor, if any ('secured creditor's power to claim unsecured sum (para (b))'); and

(c) the company's secured creditor has a power to surrender the security to the liquidator for the general benefit of creditors and claim in the winding up as an unsecured creditor for the whole debt ('secured creditor's power to surrender security ('para (c))');

(2) the secured creditor's four powers are subject to s 524(8) to (10) of the CA, namely:

(a) the company's liquidator may serve a written notice on the secured creditor:

(i) to elect within 21 days from the secured creditor's receipt of the liquidator's written notice ('21 days period') which one of the three paragraphs in s 524(1)(a) to (c) CA the secured creditor wishes to exercise ('liquidator's written notice (to put secured creditor to elect)') — please refer to s 524(8)(a)of the CA; and

(ii) if the secured creditor elects to exercise the power conferred by s 524(1)(b) or (c) of the CA, the secured creditor is required to exercise that power within the 21 days period — please see s 524(8)(b) of the CA.

(b) according to s 524(9) of the CA, if the secured creditor fails to comply with the liquidator's written notice (to put secured creditor to elect), the secured creditor:

(i) is deemed to have surrendered the security to the liquidator under s 524(1)(c) of the CA for the general benefit of creditors; and

(ii) may claim in the liquidation as an unsecured creditor for the whole debt; and

(c) in the event of a surrender of security under s 524(1)(c) or (9) of the CA and before the liquidator realises the security, the secured creditor may apply to the liquidator or the winding up court to:

(i) withdraw the surrender and rely on the security; or

(ii) submit a new claim under s 524 of the CA,

— please refer to s 524(10) of the CA;

(3) in the absence of a liquidator's written notice (to put secured creditor to elect), it is clear from s 524(2) of the CA that even if the secured creditor's

power to value security (para (b)) and/or secured creditor's power to claim unsecured sum (para (b)) has/have been previously exercised, the secured creditor's power to sell security (para (a)) may still be exercised thereafter. Consequently:

(a) the previous valuation of the security by the secured creditor ('secured creditor's previous valuation (security)'); and/or

(b) the unsecured sum claimed by the secured creditor in the company's liquidation ('secured creditor's claimed sum (unsecured debt portion)')

— cannot bar the secured creditor's power to sell security (para (a)). It is necessarily implied in s 524(2) of the CA that for the purpose of an effective exercise of the secured creditor's power to sell security (para (a)):

(i) a secured creditor may revalue the security subsequent to the Secured creditor's previous valuation (security) ('secured creditor's power to revalue security'). A secured creditor's power to revalue security ensures that the security is not sold at a gross undervalue; and

(ii) a secured creditor may withdraw or amend the secured creditor's claimed sum (unsecured debt portion); and

(4) the construction of s 524(1)(a), (b) and (2) of the CA as stated in the above sub-para (3) is supported by s 4(1) CLA, s 42 of the IA, paras 13 and 15 as follows:

(a) s 4(1) of the CLA enables the law of bankruptcy, namely, IA, to apply in the liquidation of companies — please refer to the Federal Court's judgment delivered by Zaleha Zahari FCJ in *Pilecon Realty Sdn Bhd v Public Bank & Ors and another appeal* [2013] 3 MLJ 1, at [44];

(b) according to s 42 of the IA, the rules in Schedule C to the IA 'shall be observed with respect to ... the right of proof by secured ... creditors, the admission and rejection of proofs'.
By reason of s 2(1)(b) of the Interpretation Acts, Part I of the Interpretation Acts applies to the IA because the IA has been revised under the Revision of Laws Act 1968 ('the RLA'). Section 15 of the Interpretation Acts (in Part I) states as follows:

> The long title and preamble and *every schedule (together with any note or table annexed to the schedules) to an Act* or to any subsidiary legislation *shall be construed and have effect as part of the Act* or subsidiary legislation. (Emphasis added.)

A

It is clear from s 15 of the Interpretation Acts that Schedule C (which contains paras 13 and 15) 'shall be construed and have effect' as part of the IA;

(c) para 13 confers a power on a secured creditor to amend the valuation of the security upon proof of either one of the following two circumstances by the secured creditor:

B

(i) the previous valuation was made 'bona fide on a mistaken estimate'; or

C

(ii) the security has 'increased in value since its previous valuation'; and

(d) according to para 15 , if a secured creditor has previously valued the security and subsequently realises it, the 'net amount realized shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor'.

D

In accordance with para 15, after a secured creditor's previous valuation (security), upon an exercise of the secured creditor's power to sell security (para (a)), the 'net amount realized':

E

(i) 'shall be substituted' for secured creditor's previous valuation (security); and

(ii) 'shall be treated in all respects as an amended valuation made by the creditor'.

F

G. WHAT IS THE EFFECT OF R 126 CWUR?

[37] In our opinion, r 126 of the CWUR has the following effect:

G

(1) if a company's secured creditor votes in the company's liquidation with regard to the secured creditor's 'whole debt' (which includes both the secured and unsecured portions of the debt), the secured creditor 'shall be deemed to have surrendered' the security;

H

(2) there is nothing in r 126 of the CWUR, either expressly or by necessary implication, which provides that if a secured creditor votes in the winding up matters of the company only regarding the unsecured portion of the debt (part of the debt due to the secured creditor), the secured creditor 'shall be deemed to have surrendered' the security;

I

(3) even if a company's secured creditor has voted in the company's liquidation with regard to the secured creditor's entire debt, the secured creditor's security is not deemed to have been surrendered if:

(a) the secured creditor applies to the winding up court under r 126 of the CWUR and satisfies the winding up court that the secured

creditor's omission to value the security was due to inadvertence on the part of the secured creditor; or

(b) upon an application to the winding up court by the secured creditor pursuant to r 95 of the CWUR, the winding up court is satisfied that the secured creditor had mistakenly filed a POD — please refer to the judgment of Lockhart J in the Federal Court of Australia in *Weatherburn v Bradley* BC8100255.

(4) r 126 of the CWUR cannot bar a secured creditor from:

(a) amending the secured creditor's valuation (security); and

(b) withdrawing or amending the secured creditor's claimed sum (unsecured debt portion).

CWUR is a subsidiary legislation made by the Rules Committee under the previous s 372 CA (1965) and s 16 of the Courts of Judicature Act 1964. Until the Rules Committee replaces CWUR with another subsidiary legislation, CWUR remains in force.

According to s 2(1)(e) of the Interpretation Acts, Part I of the Interpretation Acts applies to CWUR because CWUR were made after 31 December 1968 under CA (1965) (which has been revised under the RLA).

Section 23(1) of the Interpretation Acts (in Part I of the Interpretation Acts) provides as follows:

Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency. (Emphasis added.)

The scope of s 23(1) of the Interpretation Acts has been explained in the following judgment of Mohd Zawawi Salleh FCJ in the Federal Court case of *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1, at [81]:

[81] *It is trite that subsidiary or delegated legislation shall not be broader than the enabling legislation. This general principle of statutory interpretation is codified in s 23 of the [IA]* ... (Emphasis added.)

If r 126 of the CWUR is inconsistent with the effect of s 524(1)(a), (b) and (2) of the CA read with paras 13 and 15 (please refer to the above para 35), by reason of s 23(1) of the Interpretation Acts, r 126 CWUR shall be void to the extent of such an inconsistency.

In *Malayan Banking Bhd v Chip Lam Seng Enterprise Bhd* [2015] 5 CLJ 260, at [73(b)], the High Court invoked s 23(1) of the Interpretation Acts and decided that r 35(2) of the CWUR is inconsistent with the then applicable s 231 of the CA (1965) and is

therefore void to the extent of such an inconsistency.

H. HAD BANK SURRENDERED SECURITY IN THIS CASE?

[38] Contrary to the submission by the liquidators' learned counsel, we have no hesitation to decide that the bank had not elected to surrender the land as security in this case pursuant to s 524(1)(c) of the CA. This decision is premised on the following evidence and reasons:

(1) if the bank had intended to surrender the land as security, the bank would not have appointed the R&M pursuant to the debentures. Such an appointment negated the bank's surrender of the land as security — please refer to *Re Malgran Resources*, at [36(viii)] and [36(x)]; and

(2) the following documents clearly showed the bank's intention to realize the land as security for the credit facilities:

(a) the bank's email/letter (29 January 2020);

(b) the R&M's letter (19 April 2021); and

(c) the bank's letter (20 April 2021).

I. WHETHER BANK COULD REVALUE SECURITY AND WITHDRAW FOUR PODs

[39] According to the Winding Up Court, the bank had elected under s 524(1)(b) of the CA to participate in the respondent's liquidation due to the following reasons:

(1) the bank had filed four PODs;

(2) the bank's application (replacement of respondent's liquidator) had been made;

(3) in reply to a query by the OR's email (17 January 2020), the bank's email/letter (29 January 2020) stated that based on CHWTW's valuation (24 April 2019), the bank had claimed in the four PODs an unsecured portion of the respondent's debt (3 January 2019);

(4) the bank's vote as respondent's unsecured creditor (creditors' meeting); and

(5) the bank's opposition (FBSB's application).

[40] With respect, the learned JC committed an error of law as follows:

(1) as explained in the above sub-paras 35(1) and (3), in view of Kara's proposal (RM44,823,072.44), the bank had the power under s 524(1)(a) and (2) of the CA to:

(a) revalue the land for the purpose of its realization pursuant to s 524(1)(a) of the CA; and

(b) withdraw the four PODs;

(2) the Winding Up Court had failed to give effect to s 524(1)(a) and (2) of the CA; and

(3) the matters alluded to by the learned JC (as stated in the above sub-paragraphs 38(1) to (5)) cannot bar the operation of s 524(1)(a) and (2) of the CA. If otherwise, s 524(2) of the CA would be rendered redundant,

('first legal error').

[41] The Winding Up Court committed a second legal error in not giving effect to s 4(1) of the CLA, s 42 of the IA, paras 13 and 15 — please refer to the above sub-para 35(4) ('second legal error').

[42] All the cases cited by the liquidators' learned counsel can be easily distinguished from this appeal because those cases did not concern an application of s 524(1)(a), (b), (2) of the CA read with s 4(1) of the CLA, s 42 of the IA, paras 13 and 15. It is to be noted that the High Court case of *BSC Elevators* was based on the CA (1965) and was decided before the introduction of s 524(1)(a), (b) and (2) of the CA.

J. WAS R 126 OF THE CWUR APPLICABLE IN THIS CASE?

[43] The learned JC decided that the bank's vote as respondent's unsecured creditor (creditors' meeting) was made 'in accordance' with r 126 of the CWUR.

[44] As stated in the above sub-para 36(1), a company's secured creditor shall only be deemed to have surrendered the security if the secured creditor votes in the company's liquidation with regard to the secured creditor's 'whole debt' (which includes both the secured and unsecured portions of the debt). In this case, the bank did not vote at the creditors' meeting (12 February 2020) with regard to the entire respondent's debt (3 January 2019). Consequently:

(1) there could not be any room for the invocation of r 126 of the CWUR in this case; and

(2) the Winding Up Court had erred in law in this respect,

('third legal error').

K. WHETHER BANK HAD INADVERTENTLY FILED FOUR PODs

[45] We are of the view that the learned JC had committed a plain error of fact in not accepting the bank's explanation that the four PODs had been mistakenly filed based on CHWTW's valuation (24 April 2019) ('plain factual error'). Our reasons are as follows:

(1) the bank's email/letter (29 January 2020) had clearly explained to the OR (who was the respondent's liquidator at the material time) that the filing of the four PODs was premised on CHWTW's valuation (24 April 2019). In fact, a copy of CHWTW's valuation (24 April 2019) had been given, firstly to the OR and then, the liquidators' solicitors;

(2) at the time of the filing of the four PODs, the bank was not informed by the R&M of Tristar's proposal (RM24.2m); and

(3) there was neither rhyme nor reason for the bank to undervalue the land in the four PODs.

L. WAS BANK'S EXPUNGEMENT APPLICATION (WINDING UP COURT) AN AFTERTHOUGHT?

[46] The bank's expungement application (Winding Up Court) was necessary due to Kara's proposal (RM44,823,072.44). Accordingly, we cannot share the learned JC's view that the bank's expungement application (Winding Up Court) was an afterthought.

M. WHETHER BANK WAS ESTOPPED FROM WITHDRAWING FOUR PODS

[47] With respect, the learned JC committed an error of law in deciding that the bank was estopped from denying the contents of the four PODs in this case ('fourth legal error'). The fourth legal error is as follows:

(1) the doctrine of equitable estoppel is premised on case law and cannot bar the effect of s 524(1)(a), (b) and (2) of the CA read with paras 13 and 15. It is decided in the High Court case of *Jambatan Merah Sdn Bhd v Public Bank Berhad* [2015] MLJU 1208; [2016] 1 CLJ 811 at [78], as follows:

> [78] *In respect of the Defendant's purported right to exercise remedy as a chargee under s 271(1)(a) of the NLC, it is trite law that there can be no application of the issue estoppel doctrine against the operation of a statutory provision (in this case, the application of s 270(1)(a) NLC). I cite the following cases:*
>
> (a) *in Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404, *at 407, Hashim Yeop Sani CJ (Malaya) held in the Supreme Court as follows*:
>
> *On the question of issue estoppel we agree with the learned judge that on the*

facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions. (Emphasis added.)

(b) *Thomas CJ decided as follows in the Court of Appeal of the Federated Malay States in Puran Singh v Kehar Singh* [1939] 1 MLJ 71, *at 75*:

The main question argued at the appeal was that the learned trial Judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, viz., an invalid power of attorney, and that it was in consequence void under s 42 (iii) of the land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the registration. *In support of this contention he cited Borrow's case (1880) 14 ChD 432 in which it is stated by Bacon, VC, in the course of his judgment that*:

the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.

This view is followed in the case of Abdul Aziz v Kanthen Mallik 38 ILR Cal 512 515 *in which at p 515 a long list of authorities has been set out. The Court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either s 78 of the land Registration Act or s 60 of the Bengal Tenancy Act …*

So far as this is an argument on the question of estoppel it cannot in my opinion succeed, since it is only another way of saying that acts of the parties inter se can amount to an estoppel in respect of an Enactment. (Emphasis added.); and

(c) *in Re Salvage Engineers Ltd* [1962] 1 MLJ 438, *at 440, Ong J (as he then was) held in the High Court*:

There can be no estoppel against the operation of a statute. (Emphasis added.)

(2) the equitable estoppel doctrine is invoked to achieve justice. If we have applied the doctrine of equitable estoppel in this case, namely, to bar the bank from revaluing the land and to withdraw the four PODs, there will be an injustice to the bank because the extent of the bank's interest as the respondent's secured creditor will be unjustly reduced. Furthermore, the court's expungement of the four PODs in this case does not cause any injustice to the respondent's unsecured creditors.

N. OUTCOME OF THIS APPEAL

[48] In view of the first to fourth legal errors and plain factual error, we are constrained to:

(1) allow this appeal;

A (2) set aside the Winding Up Court's decision;

(3) expunge the four PODs under r 95 of the CWUR; and

(4) award RM25,000 as costs here and below to be paid to the bank from the respondent's assets (subject to allocatur fee).

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Appeal allowed.

Reported by K Selvaraju

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